No. 91-535 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE SOCIALIST WORKERS PARTY IN SUPPORT OF PETITIONER

Edward Copeland
(Counsel of Record)
Eric M. Lieberman
RABINOWITZ, BOUDIN, STANDARD
KRINSKY & LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003
(212) 254-1111

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE

The Socialist Workers Party presents this brief as Amicus Curiae in support of Petitioner, and respectfully requests this Court to reverse the decision of the Court of Appeals for the Ninth Circuit. That court held constitutional Hawaii's blanket prohibition on write-in voting in all general and primary elections finding that the ban did not constitute a substantial burden on petitioner Alan B. Burdick's right to vote or his right of political expression.

Amicus Socialist Workers Party is an unincorporated association with headquarters in New York City and branches in cities throughout the country. The Socialist Workers Party seeks "to achieve social change through the political process, and its members regularly run for public office." *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 88 (1982). The Socialist Workers Party (SWP) has consistently supported and run candidates for elective office throughout the country for municipal, county, state and federal offices since 1938 and has participated in every presidential election since 1948. Although the Socialist Workers Party has consistently fielded candidates for office, no Socialist Worker Party candidate has been elected in a partisan election and the votes recorded for such candidates remain small.

The vast majority of individuals supported by the Socialist Workers Party and its members have run as write-in candidates. For example, between 1988 and 1990 alone, approximately 210 individuals supported by the Socialist Workers Party ran for office as write-in candidates. One of the principal activities of the members and supporters of the Socialist Workers Party is comprised of participation in such campaigns. The campaigns take the form of distribution of literature, speaking tours for candidates, media interviews, extending solidarity to others fighting social and economic

injustices, and other election activity. The campaigns are a major opportunity for those who support the platforms and goals of the Socialist Workers Party to discuss and participate in the political process. Candidates and their supporters present basic socialist ideas and engage in discussion with thousands of workers and youth, focusing on a working-class alternative to the foreign and domestic policies of the predominant parties in the country. The opportunity for voters to express support for the Socialist Workers Party candidates by write-in voting, and to thereby participate fully in the electoral process, is of the utmost importance both to the supporters of the candidates and to those who participate in electoral activity. It is a means of associating together in a public, yet anonymous way, and "a means of disseminating ideas as well as attaining political office." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979).

The Socialist Workers Party has from its inception been opposed to restrictions on the franchise. It has both engaged in litigation and broader political action along with others to expand voting rights of all individuals in our society and to make meaningful the right to vote. Such freedoms are essential for all to be able to present their views and have those views heard and felt by the public at large. Candidates affiliated with the Socialist Workers Party were plaintiffs in *Dixon* v. *Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989). That ruling held unconstitutional a Maryland requirement that imposed a $150 filing fee upon candidates wishing to have ballots in their favor tallied and reported. The court below acknowledged that its decision was inconsistent with the Fourth Circuit decision in *Dixon*. (Pet. App. 14a.)[1/]

[1/] Citations preceded by Pet. App. refer to the petition for certiorari.

The Socialist Workers Party therefore has a strong interest in assuring that unconstitutional prohibitions on write-in voting do not smother the rights of individuals to vote and to thus participate fully in the electoral process. Prohibiting the casting of write-in ballots stifles a mode of associating with other like-minded individuals in support of a candidate or the ideas he or she presents.

SUMMARY OF ARGUMENT

The broad prohibition against write-in voting in general and primary elections in Hawaii directly and substantially restricts the rights of voters to participate fully in the electoral process. The prohibition bars the voter from expressing his or her support for a candidate and for the goals of a candidate if the candidate is not listed on the preprinted ballot. It restricts the voter from expressing his or her rejection of the candidates listed, and restricts the voter from associating with other like-minded individuals in a uniquely public, yet anonymous, manner. The franchise is undermined without the right to cast a ballot for the candidate of choice, whether or not the candidate's name appears on the ballot.

These rights of political participation are fundamental and have repeatedly been recognized as protected by the First and Fourteenth Amendments. In the context of write-in voting, these rights are particularly important to those of minority and dissenting views, for whom elections are not only the means of electing those who govern, but are also a means of associating together in the electoral arena and to show support for dissenting ideas and programs.

The broad and unyielding prohibition is not justified by the various interests asserted by the State of Hawaii. None of these justifications, even if legitimate, show that the complete ban is necessary to fulfill a compelling state interest. Nor is the broad prohibition somehow ameliorated by the lower

court's view that parties and candidate have easy access to the Hawaii ballot. Even if it were true, that focus ignores the independent and fundamental rights of voters which lie at the heart of this case.

ARGUMENT

I

HAWAII'S BLANKET PROHIBITION AGAINST WRITE-IN VOTING IN ALL GENERAL AND PRIMARY ELECTIONS SUBSTANTIALLY AND UNJUSTIFIABLY INTERFERES WITH THE RIGHT OF VOTERS TO EXPRESS THEIR SUPPORT FOR CANDIDATES OF THEIR OWN CHOOSING AND TO PARTICIPATE FULLY AND FREELY IN THE ELECTORAL PROCESS

This Court has long recognized the fundamental interests at stake when a state regulates voting, for "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). *See also Board of Estimate* v. *Morris*, 489 U.S. 688, 693 (1989); *Reynolds* v. *Sims*, 377 U.S. 533, 554-555, 565 (1964).

Elections, and the critical act of voting, serve a number of interrelated functions. Participation in elections and the act of voting are not only the means by which voters express their preferences for individuals to fill an office, but are also a means by which voters freely associate "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like minded citizens." *Anderson* v. *Celebrezze*, 460

U.S. 780, 788 (1983) (footnote omitted). As has been oft recognized "an election campaign is a means of disseminating ideas as well as attaining political office", *Illinois Election Board.* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979), and through participation in the electoral process, voters associate with other voters, candidates and parties "for the common advancement of political beliefs and ideas. . . ." *Kusper* v. *Pontikes*, 414 U.S. 51, 56 (1973).

As a manner of expressing opinion, and of associating together to advance particular political beliefs, voting is a means of expressing political opinions within the protection of the First and Fourteenth Amendments. *See Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968). Thus, in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), the Court focused upon the impact of candidate eligibility requirements on the rights of voters not only to choose the candidate to fill an office, but also "to associate in the electoral arena to enhance their political effectiveness as a group", *Anderson* v. *Celebrezze*, 460 U.S. at 794. Such association thereby promotes "diversity and competition in the marketplace of ideas", and introduces new ideas and programs into the political life of our nation. *Id.* *See also Illinois Election Board* v. *Socialist Workers Party*, 440 U.S. at 185-186.

As the courts below recognized, the framework set forth in *Anderson* v. *Celebrezze*, 460 U.S. at 789, provides the appropriate means for the Court to analyze restrictions on participation in elections:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those

> interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

See also Norman v. *Reed*, ___U.S.___, 60 U.S.L.W. 4075, 4077 (Jan. 14,1992). *Norman* reaffirms that within the *Anderson* analysis "any severe restriction" must be "narrowly drawn to advance a state interest of compelling importance." ___ U.S. at ___, 60 U.S.L.W. at 4077. *See also, Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214 (1986) and *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986).

The Hawaii statutory scheme directly restricts the rights of the voters by flatly prohibiting a voter from casting a write-in vote in all circumstances. Under the Hawaii scheme, whenever a voter decides that the choice of candidates on the pre-printed ballot does not present an individual or platform that he or she can or desires to support, that voter must either choose one cf the candidates on the pre-printed ballot or accept denial of the right to vote. Whether the voter's reason is based upon a late-developing issue, new information concerning an issue or candidate, disgruntlement with the choices offered on the pre-printed ballot or any other concern that affects how an individual votes, under Hawaii's restrictions a vote cannot be cast for anyone other than the candidates listed by the state on the pre-printed ballot.

The prohibition on write-in voting in all circumstances imposes a direct restriction on the right of voters not only to vote for the candidate of their choice when that candidate is not one of the listed candidates, but also on the voter's right to associate with other like-minded individuals and to express support for a candidate and for the goals that the candidate represents. Indeed, the prohibition forces a voter who desires

to cast a vote, to vote for a candidate listed or to forego voting: a voter who seeks to vote as a means of expressing rejection of the candidates on the ballot is prohibited from doing so.

It is because the fundamental right to vote is restricted, and the right of voters to engage in political expression and association is restricted, that a number of courts have found the injury to these rights protected by the First and Fourteenth Amendments to be "substantial", *Canaan* v. *Abdelnour*, 40 Cal.3d 703, 221 Cal.Rptr. 468, 477 (1985) and "of great magnitude", *Dixon*, *supra*, 478 F.2d at 782.

Write-in voting may well be a less likely route to achieve election for a candidate than listing on the pre-printed ballot. The practical difficulties associated with write-in voting turn upon a recognition that "realities of the electoral process" require that a write-in voter not only remember the name of the candidate but also require him or her to "take the affirmative step of writing it on the ballot." *Anderson* v. *Celebrezze*, 460 U.S. at 799 n. 26, *quoting Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974). *See also Williams* v. *Rhodes*, 393 U.S. at 37 (Douglas, J. concurring) ("[E]ven where operative, the write-ins are no substitute for a place on the ballot."). Nonetheless the option of the write-in ballot has been recognized by this Court. *Storer* v. *Brown*, 415 U.S. 724, 736 n.7 (1974) (In holding constitutional a requirement that an independent candidate had not been affiliated with a political party for one year before primary, noting that the write-in alternative remained open.); *Jenness* v. *Fortson*, 403 U.S. 431, 438 (1971).

But the opportunity to cast a write-in vote is not of diminished importance to the voter's ability to participate in the electoral process because a candidate receiving such votes may not have a great likelihood of success. As the district court observed in *Socialist Labor Party* v. *Rhodes*, 290 F.Supp. 983, 987 (S.D. Ohio), *aff'd in part, mod. in part sub nom.*, *Williams* v. *Rhodes*, 393 U.S. 23 (1968) "[a] write-in ballot

permits a voter to effectively exercise his individual constitutionally protected franchise. The use of write-in ballots does not and should not be dependent on the candidate's chance of success." *See also Dixon* v. *Maryland State Administrative Board of Election Laws*, 878 F.2d at 781. Indeed, when understood to require an affirmative act and commitment, casting a write-in vote reflects an element of political participation, and an expression of political message, that sometimes exceeds the simple act of voting.

Nor is that right to participate in the electoral process by write-in voting a right of limited practical importance. First, as a general matter, while write-in voting may infrequently result in the actual election of such a candidate, individuals are elected as write-in candidates. For example, in November 1991 an individual was elected to the Albany County Legislature in New York , *N.Y. Times*, Nov. 10, 1991, § 1 at 42, col. 1, in 1990 an individual was elected to the Prince Georges County Council in Maryland, *The Washington Post*, Nov. 11, 1990, at C1, and according to one report, 40 write-in candidates were elected in Indiana in 1990. 21 Election Ad. Rep. Jan. 21, 1991, No. 2, at 3. Similarly, four write-in candidates have been elected to Congress in the last 40 years; Strom Thurmond to the Senate in 1954, Dale Alford to the House of Representatives in 1958, Joe Skeen to the House of Representatives in 1980 and Ron Packard to the House of Representatives in 1982. 12 Election Ad. Rep., Nov. 22, 1982, No. 22, at 1-2; 38 Cong. Q. Weekly Report 3319 (Nov. 8, 1980). Indeed, in 1964, the Republican primary in New Hampshire "was won with write-in votes by a man who hadn't announced [his candidacy] at all, Henry Cabot Lodge." 2 W. Manchester, *The Glory And The Dream, A Narrative History of America* 1932-1972, 1256 (1973).

Second, supporters of write-in candidates, including those supported by the SWP, utilize the write-in mechanism with some frequency not only as the means of voting for the candidate of their choice but as a means of associating together in a publicly expressive fashion.[2/] For example, the Presidential candidate supported by the Socialist Workers Party in 1988 appeared on the ballot in 16 states; in the remaining states write-in voting, where available, was the only means of voting for the candidate.[3/] In the same year, the Socialist Workers Party supported 43 other candidates in 24 states and the District of Columbia of whom only 11 were listed on the ballot. In 1989, the Socialist Workers Party supported 18 candidates for local election in 9 states and the District of Columbia of whom 8 were listed on the ballot. In 1990 the Socialist Workers Party supported 175 candidates in 23 states including the District of Columbia of whom 11 were listed on the ballot in 9 states. Of the remainder, 17 attained "official" write-in status under the applicable statutes. *See The Militant*, Nov. 4, 1988, at 3; *id.*, Nov. 10, 1989 at 14; *id.*, Nov. 9, 1990, at 13.

The frequency of use of the write-in candidacy, along with the occasional actual electoral success of such candidates, illuminates the importance of the write-in for electoral par-

---

2/ The anonymity of the ballot as a means of expressing support for particular groups and ideas make the opportunity to cast a write-in vote particularly meaningful for supporters of groups that historically have suffered harassment because of their association with particular political viewpoints. *See Tashjian* v. *Republican Party of Connecticut*, 479 U.S. at 215 n.5. *See also, Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).

3/ The Socialist Workers Party has supported Presidential candidates in every Presidential election since 1948. The SWP's Presidential ticket was on the ballot in 9 states in 1964; 19 states in 1972; 28 states in 1976; 27 states in 1980; and 24 states in 1984. *See, The Millitant*, Oct. 26, 1964, at 4; *id.*, Oct. 29, 1976, at 6; *id.*, Oct. 31, 1980, at 12; *id.*, Nov. 16, 1984, at 3. Write-in voting, where available, was the only means of voting for these candidates in the remaining states.

ticipation. The ability to cast a write-in vote is of essential importance to those of dissenting and minority views, and those who choose to reject the candidates on a particular ballot and the positions represented by them. The Hawaii ban frustrates the ability of these voters who would otherwise cast a write-in vote to participate in the electoral process.

That the Hawaii scheme does so in a manner which is both absolute and unyielding is obvious from the complete prohibition of Hawaii law. That it does so without any sufficient justification is apparent if only because the broad prohibition on write-in voting imposes far too wide a restriction than is justified by the various interests and is not narrowly drawn to advance a state interest of compelling importance. For example, the asserted interest in protecting against so called "sore loser" candidacies could be served by a narrower and more focused regulation. The interest in preventing party raiding is not a concern in a general election and is not a serious concern in an open primary such as Hawaii's. It therefore is insufficient to justify the broad prohibition. *See Tashjian* v. *Republican Party of Connecticut*, 479 U.S. at 219 and n.9 (recognizing the "continuing difficulty of proving that raiding is possible" but expressing no opinion as to whether that difficulty "attenuates the asserted state interest in preventing the practice").

The court below was of the view that Hawaii election laws "provide candidates with considerable ease of access to the ballot" and so if Burdick desires to vote for a particular candidate, that candidate need only qualify under the Hawaii procedures. (Pet. App. 11a.) Ease of access to the ballot for candidates, even if true[4/], does not ameliorate the frustra-

---

4/ Hawaii's ballot access requirements present considerable obstacles and do not provide the ease of access to the ballot seemingly contem-

(continued...)

tion of the voter's rights involved here. While the rights of voters protected by the Constitution and the rights of candidates and political parties are intertwined in the electoral context and "do not lend themselves to neat separation", *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972), the rights of a voter are not identical with that of a candidate or of a political party.

Moreover, whatever the ballot access requirements, whether a political party seeks to qualify its candidate for

---

4/(...continued)
plated by the court below. For example, Hawaii's provision for new political parties requires a petition signed by 1% of the number of registered voters as of the last general election to be submitted 150 days before the primary, Haw. Rev. Stat. § 11-62. In order to utilize the new party route, an individual who might cast a write-in vote would be required to so decide long before the primary, even longer before the general election, and long before the issues in a campaign become focused by the electorate. *See Anderson* v. *Celebrezze*, 460 U.S. 780. Moreover, the process of forming a new party involves a formal affiliation with that party. Such affiliation requires a considerably different type of commitment than the commitment of write-in voters, and that commitment is an act of public affiliation which may not reflect the interest of a write-in voter who wishes to cast a write-in vote for only one particular office. *See Tashjian*, 479 U.S. at 215 n.5; *cf. Developments In the Law-Elections*, 88 Harv. L. Rev. 1111, 1167 n.79 (1975) (individual voter may have one party of choice on the state level and a separate national or local party of choice.) Similarly, in order to qualify for the general election ballot as an independent candidate for an office other than president, a candidate must run in the independent primary and either poll 10% of the vote or out poll the primary winner in a partisan campaign. Haw. Rev. State § 12-41(b). *Compare Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986) (upholding Washington requirement of 1% of vote in the primary). Indeed, in contrast to the Washington procedure in *Munro*, a voter may only vote in a particular primary in Hawaii. While perhaps not insurmountable, these provisions are nonetheless considerable obstacles.

listing on the pre-printed ballot or a candidate seeks to do so depends upon a choice of that political party or candidate, rather than the decision of a voter desiring to cast a write-in vote. *See, e.g., Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 225-226, n.15 (1989) (In rejecting argument that participation in state-run primaries reflects the party's support for each regulation of the process, the Court recognized that "[a] decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns.")

Whatever the reason for the choice which may be made by a political party or candidate, focus upon the course chosen by a political party or candidate "ignores the independent First Amendment rights" *id.*, of the voters. Indeed, the reason why a candidate might not run in an independent primary, or a new party might not be formed 150 days prior to the primary date are many and varied. The reasons may range from the emergence of new issues, the emergence of new information concerning the candidates, the difficulties presented by the state statutory scheme or a simple lack of resources at an early stage. *See, e.g., Anderson* v. *Celebrezze*, 460 U.S. at 792 (footnote omitted) ("When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.") But whatever the reason, focus upon that choice ignores the fundamental rights of the voter.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the decision of the Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

EDWARD COPELAND
(Counsel of Record)
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN,
STANDARD, KRINSKY &
LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003-9518
(212) 254-1111

Counsel for Amicus Curiae